at the trial;[7] fourth, in the case of a resident defendant, the action must be one "upon a contract, express or implied, for the direct payment of money . . ."[8] and the contract of a vendor is not such a contract;[9] fifth, the contract of a vendee *is* such a contract, and an attachment will lie, and the fact that a vendor is given a remedy denied to the vendee, though the right of both in case of breach is an action for damages, does not render section 537 of the California Code of Civil Procedure unconstitutional as denying equal protection of the law to one of the parties to the contract.[10]

It may be added that in the case of a non-resident defendant the above distinction does not apply, a different subdivision of section 537 governing. In such cases an attachment against a vendor *will* lie if the contract furnishes a standard by which the damage can be estimated.[11] *E. J.*

CONSTITUTIONAL LAW: HOUSING RELIEF LEGISLATION WITHIN POLICE POWER—Two of the most important decisions of recent years are contained in the illuminating opinions of the Supreme Court of the United States in the District of Columbia[1] and New York[2] housing relief cases. Validity of congressional action regulating for two years occupancy rights and rents of property in the American capital[3] is affirmed in *Block v. Hirsh*[4] against the expected opposition finding refuge in the Fifth Amend-

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[7] Dunn v. Mackey (1889) 80 Cal. 104, 22 Pac. 64; DeLeonis v. Etchepare (1898) 120 Cal. 407, 52 Pac. 718.

[8] Cal. Code Civ. Proc. § 537.

[9] Willet & Burr v. Alpert, n. 4. In this case the court summarized the earlier decisions, and pointed out that in every case there had been either an express or implied contract for the direct payment of money. The court summarized its holding in regard to attachment as follows: "To recapitulate, it is plain in the present case that there is no express contract for the direct payment of money; it is also plain that there is no implied contract unless the law creates the fiction of one for the purpose of permitting an action upon a common count; and finally, it is a well-settled rule that an action on a common count will not be permitted in such a case as this, where there is an express contract to do something else than pay money, and damages are sought because of the failure of the defendant to do that something else. It follows that the present action is not one in which the statute authorizes the issuance of an attachment."

[10] Greenebaum v. Smith, supra, n. 1.

[11] Hale Brothers v. Milliken (1904) 142 Cal. 134, 75 Pac. 653.

[1] Block v. Hirsh (April 18, 1921) U. S. Sup. Ct., October Term, 1920, No. 640, reversing Hirsh v. Block (1920) 267 Fed. 614. Chief Justice Smyth dissented from the opinions in the Court of Appeals holding invalid the housing relief act.

[2] Brown Holding Company v. Feldman (April 18, 1921) U. S. Sup. Ct., October Term, 1920, No. 731, affirming Brown Holding Company v. Feldman (1920) 269 Fed. 306. Hough J. See 69 University of Pennsylvania Law Review, 301-316.

[3] Congress has power under the Constitution to exercise exclusive legislation in all cases whatsoever in the seat of government of the United States. Art. 1. sec. 8, par. 17.

[4] Supra, n. 1.

ment[5] and the novel contention invoking the Seventh Amendment.[6] Constitutionality of state statutes postponing to November 1, 1922, legal remedies for the recovery of dwelling houses and requiring lessors to maintain customary building services is sustained in *Brown Holding Company v. Feldman*[7] against the time-honored objection resting on the Fourteenth Amendment,[8] the more limited theory based on section 10 of Article I of the Constitution,[9] and the original argument invoking the Thirteenth Amendment.[10]

To a supporting array of judicial authority, Mr. Justice Holmes, writing for the majority in both decisions, adds the power and weight of his own masterly analysis and logic. He declared the question was whether Congress was incompetent to meet a public emergency in the way in which it was met by most of the civilized countries of the world,[11] and added:

"The general proposition to be maintained is that circumstances have clothed the letting of buildings in the District of Columbia with a public interest so great as to justify regulation by law. . . . The space in Washington is necessarily monopolized in comparatively few hands, and letting portions of it is as much a business as any other. . . . It goes little if at all farther than the restrictions put upon the rights of the owners of money by the more debatable usury laws. . . . It is enough that we are

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[5] "No person shall be deprived of life, liberty, or property without due process of law."

[6] "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved."

[7] Supra, n. 2.

[8] "No state shall deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

[9] "No state shall pass any law impairing the obligation of contracts."

[10] "Neither slavery nor involuntary servitude shall . . . exist within the United States or any place subject to their jurisdiction."

[11] "One of the most important after-the-war problems with which practically every country has been confronted is that created by a scarcity of housing accommodations. * * * In spite of the efforts to provide adequate housing facilities, the rentals of both rooms and houses advanced materially. The rise was most marked in cities and was due in many instances of profiteering rather than to increased costs in taxes, repairs, service, etc. * * * On December 12, 1919, Governor Coolidge of Massachusetts signed a bill empowering the State Commission to investigate rents and to require landlords to produce their books on demand. The law is directly against rent profiteers. * * * The keynote to the English situation is sounded by Lloyd George in his statement, "You cannot maintain an A-1 Empire on a C-3 population. During the war the raising of rents was prohibited." New International Year Book, 1919, pp. 334 ff.

"The housing of the poorer classes has become a pressing problem in all populous Western countries, and has engaged, in varying but constantly increasing measure, the attention of legislative and administrative bodies and of philanthropic individuals and societies . . . The evils of housing in New York have been the subject of much sensational writing which has elevated them to the position of a world-wide scandal." Encyclopedia Brittanica, Vol. XIII, pp. 814 ff, 826 ff.

not warranted in saying that the legislation that has been resorted to for the same purpose all over the world is futile or has no reasonable relation to the relief sought. . . . This objection [alleged deprivation of trial by jury] amounts to little. While the act is in force there is little to decide except whether the rent allowed is reasonable, and upon that question the courts are given the last word."

New York laws were found not afflicted with the Fourteenth Amendment infirmity but firmly within the well-established principles of Munn v. Illinois;[12] the "contracts clause" was shown to be without controlling force since contracts have long been held subject to the proper exercise of the police power,[13] and the Thirteenth Amendment was not permitted to defeat the act since the building services required were not considered personal within the accepted meaning of slavery or involuntary servitude.[14]

Were it not for the dissent of four justices led by Mr. Justice McKenna, it would have been enough to say that property becomes clothed with a public interest when used in a manner to make it of public consequence and to affect the community at large,[15] or that a limit in time, to tide over a passing trouble, well may justify a law that could not be upheld as a permanent change, according to the late Chief Justice White in support of the Adamson Eight-Hour Law.[16]

But the "opposition of those whose judgments challenge attention" requires a more detailed study of the principal cases,

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[12] Mr. Justice Field, dissenting in Munn v. Illinois (1876) 94 U. S. 113, 140, 24 L. Ed. 77, foresaw the instant decisions. He said: "The public has no greater interest in the use of buildings for the storage of grain than it has in the use of buildings for the residences of families, nor, indeed, anything like so great an interest." Clearly if Munn v. Illinois is settled American law, as it has been so held without exception for nearly half a century, the housing relief cases must be considered constitutionally sound.

[13] Manigault v. Springs (1905) 199 U. S. 473, 480, 50 L. Ed. 274, 26 Sup. Ct. Rep. 127; Louisville, etc. R. R. Co. v. Mottley (1910) 219 U. S. 467, 482, 55 L. Ed. 297, 31 Sup. Ct. Rep. 265; Chicago etc. R. R. Co. v. Tranbarger (1914) 238 U. S. 67, 76, 77, 59 L. Ed. 1204, 35 Sup. Ct. Rep. 678; Union Dry Goods Co. v. Georgia etc. Corporation (1918) 248 U. S. 372, 375, 63 L. Ed. 309, 39 Sup. Ct. Rep. 117; Producers etc. Co. v. Railroad Commission of California (1919) 251 U. S. 228, 64 L. Ed. 239, 40 Sup. Ct. Rep. 135. See 69 University of Pennsylvania Law Review, 317-339.

[14] Civil Rights Cases (1883) 109 U. S. 3, 27 L. Ed. 835, 3 Sup. Ct. Rep. 18.

[15] Munn v. Illinois, supra, n. 12; Budd v. New York (1891) 143 U. S. 517, 36 L. Ed. 247, 12 Sup. Ct. Rep. 468; Brass v. North Dakota (1893) 153 U. S. 391, 38 L. Ed. 757, 14 Sup. Ct. Rep. 857; German Alliance Insurance Co. v. Lewis (1913) 233 U. S. 389, 58 L. Ed. 1011, 34 Sup. Ct. Rep. 612. "It has been asserted that any business is affected with a public interest as soon as the electorate becomes sufficiently interested in it to pass a regulating statute." Hough, J., in Brown Holding Co. v. Feldman, supra, n. 2. See Green v. Frazier (1920) 253 U. S. 233, 64 L. Ed. 878, 40 Sup. Ct. Rep. 499, 8 California Law Review, 425-9. See also 7 California Law Review, 127-132; 15 Illinois Law Review, 359-368; 19 Michigan Lew Review, 747.

[16] Wilson v. New (1916) 243 U. S. 332, 345, 346, 61 L. Ed. 755, 37 Sup. Ct. Rep. 298; Fort Smith etc. R. R. Co. v. Mills (1920) 253 U. S. 206. 64 L. Ed. 562, 40 Sup. Ct. Rep. 526.

since the learned author of the minority opinion gravely remarks "there is a violation of the positive and absolute right of property . . . the prohibition of the Fifth Amendment is as absolute as an axiom . . . a contract existing, its obligation is impregnable . . . the cases justify [only ?] the prohibition of the use of property to the injury of others . . . what will the country do with its new freedom?"

We may as well rid ourselves at once of the notion of absolute rights of property if we want a more accurate conception of legal relationships in the world about us.[17] Mr. Justice McKenna has said,[18] "A vested interest cannot be asserted against the police power because of conditions once obtaining. To so hold would preclude development and fix a city forever in its primitive conditions." So Mr. Justice Hughes[19] has declared: "Freedom of contract is a qualified and not an absolute right. There is no absolute freedom to do as one wills or to contract as one chooses. Liberty implies the absence of arbitrary restraint, not immunity from reasonable regulations and prohibitions imposed in the interests of the community."

Under the police power the right to erect buildings in a certain quarter of a city may be limited to from eighty to one hundred feet.[20] Safety pillars may be required in coal mines.[21] Billboards in cities may be regulated.[22] Watersheds in the country may be kept clear.[23]

So the price and weight of bread may be regulated.[24] Commis-

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[17] "The law of each age is ultimately what that age thinks should be the law." Pound, J., in People v. La Fetra (March 8, 1921) 230 N. Y. 429, 130 N. E. 600, 608, 6 Cornell Law Quarterly, 310-317; 6 ibid. 1-35.

[18] Hadacheck v. Sebastian (1915) 239 U. S. 394, 410, 60 L. Ed. 348, 36 Sup. Ct. Rep. 143. See also Noble State Bank v. Haskell (1910) 219 U. S. 104, 55 L. Ed. 112, 31 Sup. Ct. Rep. 186, where the court admitted, in sustaining a bank deposits statute, that the law took a portion of plaintiff's property without return to pay debts of a failing rival in business.

[19] Chicago etc. R. R. Co. v. Maguire (1910) 219 U. S. 549, 55 L. Ed. 328, 31 Sup. Ct. Rep. 259.

[20] Welch v. Swasey (1908) 214 U. S. 91, 53 L. Ed. 923, 29 Sup. Ct. Rep. 567; Salem v. Maynes (1877) 123 Mass. 372; Cochran v. Preston (1908) 108 Md. 220, 70 Atl. 113, 129 Am. St. Rep. 432, 20 L. R. A. (N. S.) 1163. Worthington, J.: "No one holds his property by such an absolute tenure so as to be freed from the power of the legislature to impose restraints and burdens required by the public good, or proper and necessary to secure the equal rights of all."

[21] Plymouth Coal Co. v. Pennsylvania (1913) 232 U. S. 531, 58 L. Ed. 713, 34 Sup. Ct. Rep. 359.

[22] St. Louis Poster Co. v. St. Louis (1918) 249 U. S. 269, 63, Ed. 599, 39 Sup. Ct. Rep. 274; Cusack Co. v. Chicago (1916) 242 U. S. 526, 61 L. Ed. 472, 37 Sup. Ct. Rep. 190.

[23] Perley v. North Carolina (1918) 249 U. S. 511, 63 L. Ed. 735, 39 Sup. Ct. Rep. 25.

[24] Schmidinger v. Chicago (1912) 226 U. S. 578, 57 L. Ed. 364, 33 Sup. Ct. Rep. 182; Mayor v. Yuille (1841) 3 Ala. (n. s.) 137, 36 Am. Dec. 441; Guillotte v. New Orleans (1857) 12 La. Ann. 432; State v. McCool (1910) 83 Kan. 428, 111 Pac. 477; Allion v. Toledo (1919) 99 Ohio St., 416 124 N. E. 239, 6 A. L. R. 426.

sion merchants may be licensed.[25] How much interest one may charge at the most in lending money may be restricted.[26] Even a man's future wages may not be his to assign if his wife or employer object.[27] With the recognition and acceptance of inheritance tax laws, the rule against perpetuities and restraints on alienation, against long agricultural or other leases, the taxing power, the right of eminent domain, and the previously enumerated limitations under the police power, what becomes of the phrase "absolute rights of property"? Society could not long have endured if unhappily such an extreme anti-social view had become part of our law.

How absolute is the "due process of law" provision of the Fifth Amendment when Congress by statute may take away from plaintiffs a valuable life pass received as compensation for personal injuries suffered on defendant's railroad?[28] Constitutional rights, like others, are matters of degree.[29] The term "absolute" is a rarity in our jurisprudence, as it is elsewhere in life. A litigant cannot deny progress and evolution[30] to a dynamic world nor contend for a stagnant cosmic level by reference to a supposedly static human document born of eighteenth century history.[31]

A contract existing, its obligation is impregnable, Mr. Justice McKenna states in his dissent.[32] Less than three years ago Mr. Justice Clarke,[33] speaking for an undivided court, said: "It is settled that neither the 'contract' clause nor the 'due process' clause has the effect of over-riding the power of the state to establish all regulations that are reasonably necessary to secure the health, safety, good order, comfort, or general welfare of the community;

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[25] Payne v. Kansas (1918) 248 U. S. 112, 63 L. Ed. 153, 39 Sup. Ct. Rep. 32; State v. Wagener (1897) 77 Minn. 483, 80 N. W. 633, 77 Am. St. Rep. 681, 46 L. R. A. 442.

[26] Mutual Loan Co. v. Martell (1911) 222 U. S. 225, 56 L. Ed. 175, 32 Sup. Ct. Rep. 74.

[27] Griffith v. Connecticut (1910) 218 U. S. 563, 54 L. Ed. 1151, 31 Sup. Ct. Rep. 132.

[28] Louisville etc. R. R. Co. v. Mottley, supra, n. 13.

[29] Martin v. District of Columbia (1906) 205 U. S. 135, 139, 51 L. Ed. 743, 27 Sup. Ct. Rep. 440.

[30] "The police power is not a rule; it is an evolution." Chadwick, J., in State v. Mountain Timber Co. (1913) 75 Wash. 581, 588, 135 Pac. 645, affirmed in 243 U. S. 219, 61 L. Ed. 678, 37 Sup. Ct. Rep. 255.

[31] "A constitution is a very human document, and must embody with greater or less fidelity the spirit of the time of its adoption. When an eighteenth century constitution forms the charter of liberty of a twentieth century government, must its general provisions be construed and interpreted by an eighteenth century mind in the light of eighteenth century conditions and ideals? Clearly not. This were to command the race to halt in its progress, to stretch the state upon a veritable bed of Procrustes." Winslow, C. J., in Borgnis v. Falk (1911) 147 Wis. 327, 349, 133 N. W. 209.

[32] "Parties by entering into contracts may not estop the legislature from enacting laws intended for the public good." Manigault v. Springs, supra, n. 13. And see the same rule enunciated in 12 Corpus Juris 991, relying on three columns of affirming adjudications.

[33] Union Dry Goods Co. 1. Georgia etc. Corporation, supra, n. 13. See 9 A. L. R. 1420.

that this power can neither be abdicated nor bargained away and is inalienable even by express grant, and that all contract and property rights are held subject to its fair exercise [citing cases]. These decisions should suffice to satisfy the most skeptical or belated investigator that the right of private contract must yield to the exigencies of the public welfare when determined in an appropriate manner by the authority of the state."

That the police power is not confined to the suppression of what is offensive, disorderly or insanitary, but extends to so dealing with the conditions which exist in the state as to bring out of them the greatest welfare of its people, was decided by Mr. Justice McKenna in Bacon v. Walker,[34] contrary to the intimations expressed by the same learned jurist in the minority opinion in the principal cases.

What will the country do with its new freedom?[35] Judge Hough points out[36] that in October last the municipal courts of New York City were flooded with 100,000 notices to quit. "According to the estimates of families commonly used by local relief associations and other statisticians, the number of persons involved in each dispossess proceeding was not less than four, and in all probability five. This meant that nearly ten percent of the permanent population of the city would (if existing laws took their course) shortly be seeking other habitations on the eve of winter."[37]

To what purpose would avail the half-million people in New York City, about to be unhoused, the felicity of expression of the dissenting justices and their eloquent tribute to the Constitution? It is to be doubted whether an instrument that would stay the hand

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[34] (1906) 204 U. S. 311, 51 L. Ed. 499, 27 Sup. Ct. Rep. 289. See Winkler v. Anderson (1919) 104 Kan. 1, 177 Pac. 521, 3 A. L. R. 268; 8 California Law Review, 429, 433; 4 California Law Review, 269.

[35] Mr. Justice McKenna wrote in German Alliance Insurance Co. v. Lewis, supra, n. 15: "Against that conservatism of the mind which puts to question every new act of regulating legislation and regards that legislation invalid or dangerous until it has become familiar, government—state and national—has pressed on in the general welfare. The dread of the moment having passed, no one is now heard to say that rights were restrained or their constitutional guarantees impaired. Nowhere have the opposing arguments been advanced with greater strength and felicity of expression than in the dissenting opinion of Mr. Justice Brewer (Budd v. New York, supra, n. 15). Every consideration was adduced, based on the private character of the business regulated, and, for that reason, its constitutional immunity from regulation, with all the power of argument and illustration of which that great judge was master. The considerations urged did not prevail. Against them the court opposed the ever-existing police power in government and its necessary exercise for the public good and declared its entire accommodations to the limitations of the constitution."

[36] Brown Holding Co. v. Feldman, supra, n. 2, p. 314.

[37] Governor Smith convened the New York Legislature in extraordinary session September 20, 1920, with the following message:

"Our temporary laws of last spring have fallen short of what was expected of them, and selfishness and greed on the part of not a few landlords has brought about an indescribable condition in the Municipal Courts

of the legislature in such emergency could be deserving of the praise bestowed upon it by the minority, but rather is the Constitution "the most wonderful work ever struck off at any given time by the brain and purpose of man" when under its beneficent protection it is the law that hundreds of thousands of families may not be unsheltered by those hiring out one of the basic and primal necessaries of life. *J. J. P.*

CONSTITUTIONAL LAW: MUNICIPAL ORDINANCE PROHIBITING DANCING BETWEEN CERTAIN HOURS AS A VIOLATION OF PERSONAL RIGHTS—

*Said mamma to the Crown City queen,*
*"Why, my dear, where on earth have you been?"*
*She replied, turning pale,*
*"We've all been in jail*
*For dancing 'till ten-seventeen."*

The above might have become a common occurrence in the city of Pasadena, if the sedulous reformers of that metropolis had had their way about it—for an ordinance was recently passed therein, which is perhaps the deepest indigo of any blue law ever constructed, being designed for every day as well as Sunday use. This is it: "Between the hours of 10 o'clock p. m. and 8 o'clock of the next succeeding day, it shall be unlawful for any person, firm or corporation in control of any room or hall, any portion of which or any window of which is within twenty-five feet of any portion of any building used as the residence of any person other than the person in control of such room or hall, to conduct dancing or the performance of dance music in such room or hall."[1] A fine of $500 or six months imprisonment or both awaited the violator.

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in New York City. I am informed by the President of the Board of Justices in the Municipal Court that there are pending for October 1 more notices of dispossess proceedings than were filed during the whole year of 1919—approximately 100,000. The courtrooms have been crowded beyond their capacity by tenants seeking relief. These figures of themselves cannot communicate the harassing uncertainty and misery caused by the constant repetition of these proceedings. It has been publicly stated by the Health Commissioner of the City of New York that this condition of uncertainty is alone a direct menace to the health and welfare of the community. The housing shortage leaves the citizen nowhere to turn. Families have been broken up and dispersed generally throughout the city, or crowded and huddled into the homes of relatives, until the health, welfare and morality of the community is seriously threatened.

"This is the time for action. We are confronted with a real problem of reconstruction. Shall we remain in the dark ages of inadequate and un-American housing, endangering the health and morals of future generations of our citizenship? Or shall we go forward with the times, and enter the new era of democracy with an enlightened interest in the fundamental needs of our cities and our citizenship for well-planned communities that serve the industrial, commercial and social needs of the people, and homes that make for a stabilized, self-respecting, wholesome family life?"

[1] See the principal case, infra, n. 9.